COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[Chapter VIII, Rule 32 (2) (b)]

Description of Case.

Writ Petition No. 103 of 2003

Satey Singh Rana

Vs.

State of Uttaranchal and others.

A.R.R. (Approved for Reporting)
~~Not Approved for Reporting.~~

(B.S. Verma, J.)

Date: 20-9-2006

Initials of Judge

THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition (M/S) No. 103 of 2003.

Satey Singh Rana, S/O Sri Matwar Singh Rana, R/O Kailash Gate, Muni-Ki-Reti, Tehri Garhwal.

… **Petitioner.**

Vs.

1. State of Uttaranchal, through Collector, Tehri Garhwal, Tehri.
2. Garhwal Mandal Vikas Nigam, Dehradun, through its Managing Director.
3. Sri Sunil Gupta, S/O Sri Babu Ram Gupta, R/O Muni-Ki-Reti, Tehri Garhwal.

…**Respondents.**

Sri B.P.Nautiyal, learned counsel for the petitioner.
Sri Nand Prasad, learned Standing Counsel for the State-respondent no.1.
Sri Alok Singh Senior Advocate, learned counsel for the respondent no.2.

Date September 20, 2006

P.C.: Hon'ble B.S. Verma, J.

By means of this writ petition, the petitioner has prayed for setting aside the orders dated 31.3.1998 and 26.9.2002 passed by respondent no.1- Collector Tehri Garhwal and Commissioner, Garhwal Region respectively. By order dated 31-3-1998, the Collector had cancelled the government grant/lease dated 25-6-1994 and transfer order dated 30-6-1994 passed in favour of Sri Sunil Gupta and Sri Staye Singh Rana. By order dated 26-9-2002, the Commissioner Garhwal Region dismissed the appeal of the petitioner on merit in the absence of the appellant-petitioner.

Relevant facts are that a lease was sanctioned under the Government Grant Act vide order No. 214/Govt. Grant-94 dated 25.6.1994 thereby 5 Nali, 7 Muthi land of Khata No. 3/7, Khasra No. 7 was given on lease for purposes of tourism in favour of Sri Sunil Gupta. Since said Sunil Gupta expressed his inability to raise constructions over the grant land and requested for transfer

of lease in favour of Satye Singh Rana to the District Magistrate, who by his order dated 30-6-1994 transferred the lease in the name of the petitioner Satye Singh Rana. It appears from the record that the Managing Director, Garhwal Mandan Vikas Nigam Dehradun raised objections regarding grant of original lease in favour of Sunil Gupta and its transfer in favour of Satye Singh Rana through various letters alleging that the lease in question was granted in the name of Sri Sunil Gupta was against the Rules. The Collector issued show cause notice to Sunil Gupta and the notice was sent for service to Tehsildar Narendra Nagar, but the notice was returned with the endorsement that Sri Sunil Gupta resides near Prince Hotel Dehradun and runs a shop there and that the lease in question was transferred in the name of Satye Singh Rana, petitioner. Accordingly, Satye Singh Rana was issued show cause notice by the Collector. Satye Singh Rana filed his reply. The Collector after having considered the material on record came to the conclusion that the lease in question had been granted in contravention of the relevant Rules and provisions. Accordingly, the lease in question was cancelled vide order dated 31-3-1998.

Aggrieved by the order of the Collector, the petitioner went up in appeal before the Commissioner Garhwal Region, who in the absence of the appellant decided the appeal on merit and dismissed the same vide order dated 26-9-2002, which gave rise to the present writ petition.

The only legal ground pressed in this writ petition by the learned counsel for the petitioner is that the impugned order of the appellate authority has committed manifest error of law in deciding the appeal on merit in default of the appellant thereby rendering the impugned order illegal

I have heard the submissions of the learned counsel appearing on behalf of the rival parties and perused material on record including the impugned orders.

It is admitted that the order dated 31-3-1998 passed by the Collector Tehri Garhwal was challenged in appeal by the petitioner-appellant before the Commissioner Garhwal Region. It is not denied that in cases of appeals, provisions of Order 41 of the C.P.C. apply. Order 41, Rule 17 of the Code of Civil Procedure reads as follows:-

"17. **Dismissal of appeal for appellant's default**-(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Explanation- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.

(2) **Hearing appeal *ex parte*-** Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte.*

Thus, it is clear from this provision, that where the appellant does not appear on the date fixed for hearing, the Court may make an order that the appeal be dismissed, but in no case the court is empowered to dismiss the appeal on the merits. As regards ex parte hearing, it is permissible only when the appellant is represented and the respondents are not present, under sub-rule (2) aforesaid.

In the instant case, the learned Commissioner has committed illegality in dismissing the appeal ex parte on merit in the absence of the appellant. Admittedly, on 26-9-2002, neither the appellant was present before the learned Commissioner nor he was represented through counsel, therefore, in view of Explanation appended to Rule 17, sub-rule (1), the only course open to the appellate court was to dismiss the appeal in default of the appellant and there was no occasion for the learned Commissioner to have invoked the provision of sub-rule (2) of Rule 17 of Order 41 of the CPC, which comes into play only when the appellant is present or represented in the Court and respondent does not appear and not

otherwise, therefore, clearly the impugned order passed by the learned Commissioner is liable to be set aside. It is a fit case for remand of the matter to the appellate court, which shall decide the appeal afresh on merit within a period of four weeks from the date of production of certified copy of the order.

In view of the above, the writ petition succeeds and is allowed. The impugned order passed by the Commissioner Garhwal Region ***(Annexure No. 8 to the writ petition***) is set aside. No order as to costs.

The matter is remanded to the learned Commissioner who shall decide the Misc. Appeal No. 1/1997-98 afresh on merits after hearing both the parties in accordance with law, within a period of four weeks from the date of production of certified copy of this order. Both the parties shall appear before the learned Commissioner Garhwal Region on 29-09-2006 co-operate with the appellate court in expeditious decision of appeal.

(B.S. Verma, J.)

RCP